VADIVELU A/L PALANISAMY

v.

M. RADHAKRISHNAN

HIGH COURT MALAYA, IPOH
DATO' ABDUL HAMID EMBONG JC
[ORIGINATING SUMMONS NO. 25-34-93]
15 JUNE 1995

LAND LAW: *Section 418 NLC - Appeal against order of Land Administrator creating right of way over applicant's land - Enquiry conducted under s. 390 NLC - Inspection of land by Land Administrator - Whether alternative access roads existing - Whether Land Administrator failed to consider availability of alternative access roads.*

The respondent is the registered owner of Lot 2420, Mukim Sitiawan, Daerah Manjung and the applicant is the registered owner of Lot 3332, adjacent to Lot 2420. On 27 April 1993, an enquiry was conducted by the Land Administrator of that district under s. 390 of the National Land Code (NLC) pursuant to the respondent's application for a right of way over the applicant's land. This enquiry was a continuation of an earlier enquiry held on 21 July 1992 where the lands involved were inspected by the Land Administrator resulting in a final order granting the respondent the right of way.

The applicant appealed against the order of the Land Administrator under s. 418 of the NLC on the ground that there were two alternative access roads available to the respondent which the Land Administrator had failed to consider. In support, the applicant submitted a plan of the area "VP1" showing the two access roads, the north road which had been in existence since 1929 passable to light vehicles and the south road passable to heavy vehicles. He claimed that the respondent had knowledge of the existence of these roads when he purchased Lot 2420.

The respondent contended that Lot 2420 was virtually landlocked by surrounding land alienated to the applicant and there was no direct access road into his land save for a reserve road. He argued that the alleged access roads were mere temporary lanes suitable only for pedestrians, bicycles and motorcycles and the lanes wound through various alienated lands, Furthermore, the south road cut through a low swampy area prone to floodings and the only access into his land passable by lorry was through a road reserve ending at the applicant's land. Since his Lot 2420 was planted with oil palm it was imperative for him to acquire a right of way in order to bring in lorries to transport his produce once a fortnight. The respondent exhibited a lithographic sheet of a gazetted surveyed plan of the area, "R11", depicting the relevant lots and submitted that as a surveyed plan, "R11" was a truer representation than the plan "VP1" exhibited by the applicant.

Held:

[1] "R11" being a duly certified copy of a public document made pursuant to s. 76 of the Evidence Act is accepted by the Court as the authoritative representation of what actually exists on the ground. "R11" does not show the existence of the north and south roads as alleged by the applicants but instead supports the respondent's assertion that the only access roads in existence are the gazetted road reserves. The north and south roads may exist but in the Court's view they are not access roads in the true sense but merely

temporary lanes not passable to modern vehicles. These lanes can be used only for as long as the landowners through whose lands they pass allow them to be used.

[2] To hold that this right of way should not be created in favour of the respondent due to the alleged existence of the north and south access roads would not only be against the weight of the evidence in favour of its creation but also against public policy and the interest of the occupiers of the lands in the vicinity.

[3] The Court finds that the Land Administrator had meticulously investigated into the merit of this application and had satisfied himself, on an objective basis, that there was a case for the creation of this right of way. The Land Administrator had properly evaluated the facts as he found them before exercising his discretion and this Court finds no reason to differ from his finding and so confirms his order.

[Appeal dismissed with costs].

Cases referred to:
Liew Peck Lian & Ors. v. Conservator of Forests Johore [1961] 27 MLJ 117 ***(refd)***
Si Rusa Inn Sdn. Bhd. & Ors. v. Collectors of Land Revenue, Port Dickson & Ors. [1987] 1 MLJ 147 ***(refd)***

Legislation referred to:
Evidence Act, s. 76
Johore Land Enactment (Johore Enactment No. 1)
National Land Code ss. 284, 389, 390(1), (3), 395(1), 418

Other source referred to:
Tenure and Land Dealings in the Malay States, S.Y. Wong, p. 207

For the applicant - D.J. Maneksha; M/s. Mariadass, Lock & Ainuddin
For the respondent - Ting Chek Ming; M/s. Ting Chek Ming & Co.

JUDGMENT

Abdul Hamid Embong JC:

This is an appeal under s. 418 National Land Code (NLC) by the applicant from an order made by the Land Administrator, creating a private right of way for the benefit of the respondent over the applicant's land.

The respondent is the registered proprietor of Lot No. 2420 Mukim Sitiawan, Daerah Manjung (hereinafter referred to as Lot 2420) and the applicant is the registered proprietor of Lot 3332 which is adjacent to Lot 2420.

On 27 April 1993 the Land Administrator of Pejabat Tanah Manjung conducted an enquiry under s. 390 NLC pursuant to the respondent's application for a right of way over the applicant's land.

Both parties to this appeal attended that 27 April 1993 enquiry, at the end of which the Land Administrator made the following order:

> Perintah: Setelah meneliti dan mengkaji keadaan di atas tanah yang pernah saya lawati pada 21 Julai 1992, dan dengan tiada laluan yang dapat digunakan untuk membawa kenderaan ke tanah Lot 2420 maka saya berpendapat bahawa satu hak lalulalang hendaklah diwujudkan ke atas Lot 3332 dalam Mukim Sitiawan.

The record shows that an earlier enquiry was held by the Land Administrator on 21 July 1992 in respect of the same application and with the presence of the same parties. That enquiry ended with the Land Administrator inspecting the lands involved and though no formal order was made to conclude the enquiry, the notes of enquiry contained the following concluding paragraph:

> Berdasarkan pada fakta di atas hak lalulalang seperti yang dipohon oleh pemohon adalah munasabah kerana ia hanya melibatkan sebahagian kecil daripada Lot 3332 dan kedudukannya yang menyambungkan Lot 2420 ke rezab laluan yang terdekat. Anggaran kawasan yang terlibat ialah lebih kurang 0.15 ekar.

These words noted by the Land Administrator could not be in my view a final order creating a right of way as stated in s. 390(3) NLC:

> (3) The Land Administrator, if on holding an enquiry or making an investigation he is satisfied that it is expedient for a private or public right of way to be created, shall make an order creating the right of way.

In my view the enquiry on 27 April 1993 was actually a continuation of the enquiry which commenced on 21 July 1992. The basis of the order made on 27 April 1993 also makes reference to the inspection conducted on the lands by the Land Administrator on 21 July 1992. This fact was not adverted to by both parties in this appeal. However, I feel that it needs to be given due consideration. Although the applicant contended that the decision was made by the Land Administrator on 28 May 1993 *vide* the latter's letter to him as exhibited in 'VP2' annexed to his affidavit dated 5 August 1993 (encl. 1), it is clear that the order was actually made at the conclusion of the enquiry itself i.e. on 27 April 1993; 'VP2' being merely a communication of that decision.

The applicant's main ground in this appeal is that there are available to the respondent two access roads as alternative routes to the latter's land. In support, the applicant exhibited a plan of the area, marked 'VP1' annexed to his affidavit (encl. 1). In 'VP1', the two roads are marked in blue (the north road) and orange (the south road). Both roads end onto the respondent's land (Lot 2420). The north road has been in existence since 1929 and is passable to light vehicles, and the south road passable to heavy vehicles. It was argued that when the respondent purchased Lot 2420 he knew of these existing access roads to his land. It was also not disputed that his predecessor in title had in 1986 made a similar application to create a private right of way into Lot 2420 but that application was refused by the then Land Administrator. Applicant's Counsel submitted that since the Land Administrator had failed to consider the availability of the existing access roads and that the creation of this right of way would only benefit the respondent, this order made on 27 April 1993, should be set aside.

In *Liew Peck Lian & Ors. v. Conservator of Forests Johore* [1961] 27 MLJ 117, the applicant had objected to the creation of right of way by the Collector across his two lots of rubber estate. The right of way was created to allow access to timber licensees operating behind the applicant's lands. It was shown that there were alternative access routes available to the respondent but the Collector had assumed that those routes were inconvenient to the licensees. Adam J in allowing the appeal said:

> Before a right of way can be granted under these provisions the Collector must satisfy himself that access is not otherwise reasonably available and "reasonably" here certainly does not mean "conveniently". I think it is necessary to bear this in mind. The Collector must look at

all the circumstances. He must consider whether the alternative routes, if any, are at all practical. This does not mean that they must necessarily be the cheapest, or most convenient.

The basis for this strict approach in creating the right of way under the then Johore Land Enactment (Johore Enactment No. 1), appears in the following passage at page 338:

Since what the conservator of forests asks will establish if granted a right of way running with the appellant's land in perpetuity whereas the extraction of the timber will only take 2½ years and since this is an infraction of the right of a private owner to use his land as he likes, it must be a condition precedent to such a grant that a very good reason exists for so granting. The facts for example that it would be very expensive for the timber licensee not to grant the right of way or more convenient for the timber licensee are irrelevant.

However, a right of way which is created under s. 390 NLC is not perpetual in nature. Section 395(1) NLC clearly provides the circumstances for its extinction. The section states:

395. Extinction of right

(1) The Land Administrator, where he is of the opinion that:

(a) any person has failed to comply with any condition relating to the exercise by that person of Land Administrator's right of way: or

(b) it is inexpedient that a Land Administrator's right of way should continue to exist.

may hold an enquiry and thereafter order the right of way to be extinguished.

With respect, I am in agreement with Adams J that the existence of alternative routes must be a factor to be taken into account by the Land Administrator in deciding whether to create a right of way or not.

In *Si Rusa Inn Sdn. Bhd. & Ors. v. Collectors of Land Revenue, Port Dickson & Ors.* [1987] 1 MLJ 147, Peh Swee Chin J (now Federal Court Judge) in giving his view on the word 'expedient' found in s. 390 NLC, stated:

It is my view that when a Collector is satisfied that it is expedient, it is tantamount to this, that he should then act or exercise his discretion properly and reasonably, in all cases, save in exceptional circumstances where such departure from such propriety or reasonableness can be made.

The learned Judge also agreed with decision in *Liew Peck Lian (supra)* that the convenience of the grantee of the right of way should not to be a reason compelling its creation. It should be noted that in *Si Rusa Inn,* the grantee's application was for a right of way to his foreshore lot, his land being a second-layer lot, having no direct access to the foreshore lot. There was an alternative access route to the foreshore lot but that would entail the grantee having to traverse a further one to two kilometres and that, it was argued, was not convenient. The grantee's foreshore lot was a seaside resort with a holiday bungalow built thereon and it was also argued that the right of way was essential to the enjoyment of it; that the pleasure purpose was within the meaning of the word 'benefit' found in s. 389 NLC. His Lordship found the purpose of the grantee's application to be, in his words "one of pleasure, pure and simple. He wanted a shorter, or much shorter route to the sea for swimming and allied activities." Applying the facts to the test of proper and reasonable application of the Collector's discretion, the learned Judge concluded thus:

a it is difficult also to imagine a less urgent necessity or situation than that before the said Collector (at page 153F)

With respect, I have no reason to depart from both the authorities mentioned above. With that in mind, I now consider the respondent's case, which as will be seen is factually distinguishable from the facts in the two cases abovementioned.

b The respondent in his affidavit in reply (encl. 4) contended that his land, Lot 2420, is virtually landlocked and surrounded by land alienated to the applicant (except for lots 5833 and 6118). There is also no direct access road into his land save for a reserve road. The alleged existence of the access road (the north and south roads) as shown by the applicant's plan, 'VP1' according to the respondent, are mere temporary lanes suitable only for pedestrians, bicycles c and motorcycles. These lanes furthermore wind through various alienated lands. The south road cuts through a low swampy area, prone to flooding. It was also contended that these lanes may be cut off at any time by the landowners when they planted cash crops on their land since they would then fence up their land. Respondent also contended that the only access into his land passable by lorry, is through a road reserve which ends at Lot 6090, also the applicant's land. Since his Lot 2420, measuring some 12 acres is now planted with d oil palm it is imperative for him to acquire a right of way cutting through about 70 feet of applicant's Lot 3332 in order to bring in lorries to transport his produce once a fortnight. In support, respondent also exhibited a letter from the Pertubuhan Peladang Kawasan Manjung Selatan (R4 in encl. 4) recommending the creation of the right of way to transport his produce.

In encl. 4, the respondent also exhibited 'R11' a lithographic sheet of a gazetted surveyed e plan of the area depicting the relevant lots. It was submitted that since 'R11' is a surveyed plan of the area, it is a truer representation than the plan 'VP1' exhibited by the applicant. I entirely agree with this submission. 'R11' being a duly certified copy of a public document made pursuant to s. 76 of the Evidence Act, this Court would have to accept its content as the authoritative representation of what actually exists on the ground. 'R11', it may be noted does not show the existence of the north and south road as alleged by the applicant to be f the existing access roads to Lot 2420. 'R11' instead supports the respondent's assertion that the only access roads in existence are the gazetted road reserves, marked therein in yellow. It may well be that the north and south roads do exist as alleged by the applicant but in my view they are not access roads in the true sense. I am satisfied that even if these roads existed they are merely temporary lanes not passable to modern vehicles. I also find that these lanes can be used only for as long as the landowners through whose lands they pass g allowed them to be used. The argument that the north road had been in existence since 1929, thus suggesting that a prescription may be claimed by its users is untenable under the NLC. Section 284 NLC expressly states that no easement shall be capable of being acquired by prescription. Furthermore 'R11' clearly shows that the only existing access road from Lot 2420 to the public terminal in this instance is through the road reserve marked in yellow h therein.

A close look at 'R11' shows that the gazetted road reserves are well laid out, traversing along the boundaries of the respective lots involved, and without cutting through those lots. David S.Y. Wong in his book *Tenure and Land Dealings in the Malay States* discussed the rationale underlying the powers given to Land Administrators to create a private right of i way. I feel that it is necessary to quote him here for a better understanding of s. 390 NLC, and remind myself of its purport. At page 207 he said:

During the early years right up to the turn of the century when agricultural or plantation enterprises were in a state of uncertainty, the Government, in encouraging the settlement of native cultivators, usually alloted to them holdings abutting on the main roads. When large areas of land began to be rapidly taken up for planting rubber from 1903 onwards, a problem was already strongly felt by 1905 that, as frontages of existing roads had been taken up by native holdings "stretching for miles on either side" access to extensive areas of land behind them were wholly or partially blocked. While the Government did its best to resume those native holdings by way of forfeiture where they had been abandoned, private "estate owners were also at pains to secure road frontage when possible by buying out the intervening natives." With the rapid increase of the areas of land granted for rubber planting, an amendment was introduced in 1909 to the then existing Land Enactment, 1903, which grafted an implied condition to "every title to land other than land situated within the boundaries of a township or village" (whether granted prior or subsequent to the amendment) to the effect that a right of way could be created over any such land by the Collector upon the claim and in favour of the owner or occupier of any adjacent or contiguous land "to facilitate his access to the nearest public road."

This situation persists until today, more so in the face of rapid land developments and alienations. In my judgment, to hold that this right of way should not be created in favour of the respondent due to the alleged existence of the north and south access roads here would not only be against the weight of evidence in favour of its creation but also against public policy and the interest of the occupiers of the lands in the vicinity. The respondent here has also agreed to surrender part of his Lot 2420 for the creation of this right of way, thus extending the reserve road southward. This I feel is not only a noble cause on his part but also necessary in the interest of the landowners in the vicinity.

On the submission that the Land Administrator during his enquiry had failed to take into consideration the existence of the two access roads, I can only say that his notes of enquiry shows otherwise. He had personally visited the area on 21 July 1992 and found as a fact that, in his own words, "tiada laluan yang dapat digunakan untuk membawa kenderaan ke tanah Lot 2420". I find that the Land Administrator here had meticulously investigated into the merit of this application and had satisfied himself, on an objective basis, that there was a case for the creation of this right of way. I can only conclude that the Land Administrator had properly evaluated the facts as he found them before exercising his discretion. I find no reason to differ with his satisfaction, and so confirm his order.

This appeal is dismissed with costs.